

Clerk of Montana Supreme Court
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ORIGINAL

FILED

12/07/2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

Re: Professional Rules of Conduct- Rule 8.4

Honorable Members of the Court,

12/5/16

I am writing to oppose the adoption of the Professional Rules of Conduct found in Rule 8.4. I believe that adopting this rule will have an effect of discrimination to those who are not listed as a protected class of citizens, have conflicting consequences and erode the practice of law in the state of Montana. The rule is ambiguous in certain places and will lead to confusion. Ignoring the 450 letters most of which were in opposition when the rule was proposed at the national ABA bothers me as well.

Some of my concerns:

- It only allows lawyers to be able to express one viewpoint thereby forming a sort of "reverse discrimination" against those who are not in agreement with that viewpoint. Perhaps the most troubling is the likelihood that the new rule will be used to chill lawyers' expression of opposing views regarding political, social, and religious viewpoints.
- It also appears to change the freedom of a lawyer to be able to refuse to accept a client in which he has a fundamental conscience problem.
- It seems to allow a lawyer's freedom of speech and conduct to be very limited especially if he is an advisor to a religious or fraternal group whose views would differ with the "supposed" protected classes. This work is often done pro bono or at a reduced fee for these types of groups. Where is the freedom of speech for the lawyer? And who then can represent these types of groups if the advising lawyer is "hobbled" to be able to give them counsel.
- It appears that there isn't a need for this rule which was brought up by the ABA's own Standing Committee on Professional Discipline when they questioned whether there was a demonstrated need for the rule change and raising concerns about its enforceability.
- Many states black-letter laws are narrower in significant ways than model rules 8.4(g)'s expansive scope. Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be instigated.
- Finally, the stated purpose of this rule was to a need for a cultural shift in understanding the inherent integrity of people..." In other words, the rule change was not proposed for the sake of protecting clients, for protecting attorneys, or for protecting the court. It was proposed because the American Bar Association felt the need to promote a cultural shift.

There is so much more that could be written but these listed concerns are strong enough that I believe that this Rules of Conduct- Rule 8.4 should not be adopted.

Sincerely,



Willeen A Erpenbach

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA